IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 8, 2009

STATE OF TENNESSEE v. CHARLES MITCHELL TUCKER, JR.

Appeal from the Circuit Court for Bedford County
No. 16689 Lee Russell, Judge

No. M2009-00718-CCA-R3-CD - Filed January 7, 2010

The Defendant, Charles Mitchell Tucker, Jr., appeals the sentencing decision of the Bedford County Circuit Court. On January 8, 2009, he pleaded guilty to six counts each of burglary of an automobile and theft of property valued at $500 or less. Following a sentencing hearing, the trial court imposed an effective three-year sentence and ordered the Defendant to serve his sentence in the Department of Correction. On appeal, the Defendant argues that the trial court erred in denying his request for full probation. Upon our review of the record and the parties' briefs, we affirm the sentencing decision of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which ALAN E. GLENN and ROBERT W. WEDEMEYER, JJ., joined.

Michael J. Collins, Assistant Public Defender, Shelbyville, Tennessee, for the appellant, Charles Mitchell Tucker, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Charles Crawford, District Attorney General; and Michael D. Randles, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

A Bedford County grand jury returned a twelve-count indictment against the Defendant for events occurring on March 13, 2008, charging the Defendant with six counts

each of burglary of an automobile, a Class E felony, and theft of property valued at $500 or less, a Class A misdemeanor. See Tenn. Code Ann. §§ 39-14-103, -105, -402. The Defendant entered an "open plea" to the indictment on January 8, 2009. At the guilty plea hearing, the State recounted the following facts supporting the Defendant's convictions:

> This was the break-in of a multitude of cars in Shelbyville all in one night. The police department responded and took at least two dozen reports of vehicle break-ins that night, some involving the additional aspect of personal property being stolen from the interior of the vehicles.
>
> Of course, the police department investigated this. But what happened was, this [D]efendant and his co-defendants were caught in Rutherford County, I believe, in the course of an aggravated burglary there; and they were found in possession of some of the property from the auto burglaries here in Shelbyville.
>
> They were interviewed by a detective and confessed to being involved in these auto burglaries and implicated one another in also being involved.

A sentencing hearing was held on February 5, 2009. At the beginning of the hearing, the State entered the presentence report into evidence as an exhibit. The report shows that, at the time of the sentencing hearing, the Defendant was twenty years old, was single, had no children, and had graduated from high school. Prior to his incarceration, the Defendant stated that he was employed as a subcontractor installing and repairing heating and air conditioning units. The Defendant had also been employed at a Captain D's restaurant from November 2006 to July 2007. According to the Defendant, he planned to live with his mother once released. He further averred that he quit smoking marijuana when he violated his misdemeanor probation.

Prior to the string of automobile break-ins in the present case, the Defendant apparently went on another spree in January 2008 in Rutherford County (Case No. F61586C), resulting in convictions for one count of aggravated burglary, one count of theft of property valued between $1,000-$10,000, and four counts of burglary of an automobile. His criminal history also included a conviction for marijuana possession on June 11, 2007, and he was still serving that sentence on probation at the time he committed these crimes. This June 11, 2007 marijuana conviction resulted from the termination of diversion due to his testing positive for drugs.

The Defendant's mother, Wendy Harmon, testified. She had been in daily contact with the Defendant since his incarceration. According to Ms. Harmon, the Defendant had

accepted full responsibility for his actions and was very remorseful. She acknowledged that the Defendant had also previously been adjudicated delinquent in juvenile court for marijuana possession. Ms. Harmon also confirmed that the Defendant would be living with her once he was released and would be working with her brother.

Melody Harmon, the Defendant's grandmother, also testified. She had visited her grandson in jail on several occasions, and they wrote letters back and forth. When asked if she had noticed a difference in the Defendant since his incarceration, she stated, "Yes, I have." According to his grandmother, this difference was the result of the Defendant finding religion and attending bible studies while in jail.

Finally, the Defendant's uncle, Ronald Kenneth Harmon, testified that he worked in heating and air conditioning. According to Mr. Harmon, the Defendant worked with him prior to these charges and would be permitted to return to work once released. Mr. Harmon relayed that the Defendant was "a real good worker."

At the conclusion of the hearing, the trial court imposed partial consecutive sentences, for an effective three-year sentence, as a Range I, standard offender, for these convictions. This sentence was ordered to be served consecutively to his sentence in the Rutherford County case. The court denied the Defendant's request for a suspended sentence and ordered the Defendant to serve his sentence in the Department of Correction. The trial court reasoned as follows:

> I find that the significant factor here is set out in 40-35-103(5), which is potential or lack of potential for rehabilitation including the risk of committing another crime while on probation. We know that he was on probation, misdemeanor probation, at the time of these particular incidents. And for that reason, I believe there is, there's little potential for rehabilitation without significant amount of incarceration.

Judgments of convictions were entered to this effect. The Defendant now appeals from the trial judge's denial of full probation.

Analysis

On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. See Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Comments; see also State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). When a defendant challenges the length, range, or manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that the determinations made by the court from which the appeal is taken are correct. Tenn. Code

Ann. § 40-35-401(d). However, this presumption "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Pettus, 986 S.W.2d 540, 543-44 (Tenn. 1999); see also State v. Carter, 254 S.W.3d 335, 344-45 (Tenn. 2008). If our review reflects that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see also Carter, 254 S.W.3d at 344-45.

In conducting a de novo review of a sentence, this Court must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (f) any statistical information provided by the Administrative Office of the Courts as to Tennessee sentencing practices for similar offenses; and (g) any statement the defendant wishes to make in the defendant's own behalf about sentencing. Tenn. Code Ann. § 40-35-210(b); see also Carter, 254 S.W.3d at 343; State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002).

Effective June 7, 2005, our legislature amended Tennessee Code Annotated section 40-35-102(6) by deleting the statutory presumption that a defendant who is convicted of a Class C, D, or E felony, as a mitigated or standard offender, is a favorable candidate for alternative sentencing. Our sentencing law now provides that a defendant who does not possess a criminal history showing a clear disregard for society's laws and morals, who has not failed past rehabilitation efforts, and who "is an especially mitigated or standard offender convicted of a Class C, D or E felony, *should* be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. A court shall consider, but is not bound by, this advisory sentencing guideline." Tenn. Code Ann. § 40-35-102(5), (6) (emphasis added). No longer is any defendant entitled to a presumption that he or she is a favorable candidate for alternative sentencing. Carter, 254 S.W.3d at 347.

The following considerations provide guidance regarding what constitutes "evidence to the contrary":

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant . . . .

Tenn. Code Ann. § 40-35-103(1); see also Carter, 254 S.W.3d at 347. Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. Tenn. Code Ann. § 40-35-103(2), (4). The court should also consider the defendant's potential for rehabilitation or treatment in determining the appropriate sentence. Tenn. Code Ann. § 40-35-103(5).

The Defendant is eligible for probation because his actual sentence was less than ten years and the offense for which he was sentenced is not specifically excluded by statute. See Tenn. Code Ann. § 40-35-303(a). However, a defendant bears the burden of proving his or her suitability for probation. See Tenn. Code Ann. § 40-35-303(b); see also Carter, 254 S.W.3d at 347. No criminal defendant is automatically entitled to probation as a matter of law. See Tenn. Code Ann. § 40-35-303(b), Sentencing Commission Comments; State v. Davis, 940 S.W.2d 558, 559 (Tenn. 1997). Rather, the defendant must demonstrate that probation would serve the ends of justice and the best interests of both the public and the defendant. See Carter, 254 S.W.3d at 347; State v. Souder, 105 S.W.3d 602, 607 (Tenn. Crim. App. 2002).

In determining whether to grant probation, the court must consider the nature and circumstances of the offense; the defendant's criminal record; his or her background and social history; his or her present condition, both physical and mental; the deterrent effect on the defendant; and the defendant's potential for rehabilitation or treatment. See Souder, 105 S.W.3d at 607. If the court determines that a period of probation is appropriate, it shall sentence the defendant to a specific sentence but then suspend that sentence and place the defendant on supervised or unsupervised probation either immediately or after the service of a period of confinement. See Tenn. Code Ann. §§ 40-35-303(c), -306(a).

In reviewing the trial court's decision, we first conclude that the trial court considered sentencing principles and relevant facts and circumstances. Thus, the judge's decision is presumptively correct. We also conclude that the trial court acted within its discretionary authority in ordering the Defendant to serve his sentence in the Department of Correction rather than on probation. The Defendant, only twenty years old, possesses a significant criminal history, including two crime sprees occurring within two months of each other in

January and March 2008. He has previously been convicted of marijuana possession. Moreover, the Defendant was on probation for that conviction at the time he committed the crimes at issue herein. He has previously failed at diversion, testing positive for drugs. The Defendant's conduct while on release status demonstrates that he does not take seriously his need for rehabilitation. Measures less restrictive than confinement have recently been applied unsuccessfully to this Defendant.

The Defendant has not carried his burden of establishing his suitability for probation and has not established that the suspension of his sentence serves the ends of justice or the best interest of the public. The record supports the trial court's finding that the Defendant has a poor potential for rehabilitation. Based upon our review of the record, we conclude that the Defendant has not overcome the presumption that the sentencing determination made by the trial court is correct.

Conclusion

The trial court did not err by denying the Defendant's request for full probation and ordering him to serve his sentence in confinement. The judgment of the trial court is affirmed.

_____

DAVID H. WELLES, JUDGE